



1 **BACKGROUND**

2 **Ms. Lial's Hiring**

3 The County hired Ms. Lial in 1999, and in 2001, she transferred to the County's Code  
4 Enforcement Unit and became a Zoning Enforcement Officer in the current Department of  
5 Environmental Resources ("DER").

6 **Relationship With Michael Newton**

7 Ms. Lial has been involved in romantic relationships with two co-workers in the Code  
8 Enforcement Unit. In summer 2001, Ms. Lial began a romantic relationship with Michael Newton ("Mr.  
9 Newton"), another Zoning Enforcement Officer. In fall 2001, Mr. Newton was promoted to Code  
10 Enforcement Manager and became Ms. Lial's supervisor. Ms. Newton's romantic relationship with Mr.  
11 Newton ended after about a year in summer 2002.

12 In 2007, Ms. Lial learned that Mr. Newton had started an "internal investigation" into (using Ms.  
13 Lial's words) Ms. Lial's "looking at inappropriate sites on my computer," "work performance issues,"  
14 and "billing regarding weed-and-seed projects." Ms. Lial believed that Mr. Newton "was going to start  
15 to try and fire me."

16 On May 30, 2007, Ms. Lial complained to DER Equal Rights Officer Merry Rorabaugh ("Ms.  
17 Rorabaugh") that Mr. Newton retaliated against her for their failed relationship and for problems in his  
18 marriage caused by Ms. Lial. Ms. Lial accused Mr. Newton of humiliating her "in front of others."

19 The County hired an outside investigator to address Ms. Lial's accusations against Mr. Newton.  
20 The investigation did not substantiate Ms. Lial's claims that Mr. Newton harassed her. Nonetheless, the  
21 County terminated Mr. Newton in July 2007 for other reasons. After Mr. Newton's termination, Ms.  
22 Lial dropped her complaints about him.

23 **Relationship With Mr. Woodward**

24 In September 2005, the County hired Mr. Woodward as a Zoning Enforcement Officer. In  
25 October 2005, Ms. Lial and Mr. Woodward began a romantic relationship which ended a year later in  
26 October 2006.

27 On October 29, 2007, Mr. Woodward was promoted to Code Enforcement Manager and became  
28 Ms. Lial's supervisor. Mr. Woodward implemented procedures which he expected Zoning Enforcement

1 Officers to follow and met with the Zoning Enforcement Officers to discuss the procedures and provide  
2 them a written copy. In her deposition, Ms. Lial testified that some “procedures were warranted” and  
3 were “welcome changes” but others were not “necessary.” Ms. Lial describes Mr. Woodward’s  
4 management style as less “laid back” than previous managers in that “prior to Mr. Woodward becoming  
5 manager, there was no management and that when he became manager, it was extreme  
6 micromanagement.” Ms. Lial claims that other Code Enforcement Officers, male and female, had  
7 problems with Mr. Woodward’s procedures but acknowledges that the procedures were within Mr.  
8 Woodward’s managerial discretion.

9       After meeting with Ms. Lial, Mr. Woodward prepared a November 28, 2007 memo regarding  
10 “Insubordination, and Rude, Disrespectful Behavior” to address several occasions of Ms. Lial raising  
11 her voice “in defiance” to elicit cautions to lower her voice. The memo concluded that Ms. Lial’s  
12 “behavior is inappropriate and unacceptable,” that her “attitude is condescending,” and that she is  
13 “argumentative to the point of insubordination.”

14       On December 3, 2007, Ms. Rorabaugh met with Ms. Lial to discuss Ms. Lial’s claims that Mr.  
15 Woodward harassed Ms. Lial. Ms. Rorabaugh provided her meeting notes to Ms. Lial so, as Ms.  
16 Rorabaugh stated in her declaration, “she could notify me of any discrepancies or add to her complaint.  
17 Ms. Lial informed me that my notes were correct and, accordingly, I began an investigation.” Ms.  
18 Rorabaugh’s investigation revealed no “evidence of harassment that violated the County’s Harassment  
19 Policy.” Ms. Rorabaugh’s January 7, 2008 memo to Ms. Lial explained that Ms. Lial’s “allegation of  
20 harassment appears unfounded based on our investigation.” The memo notified Ms. Lial of her right  
21 to appeal the findings, but Ms. Lial did not appeal the findings.

22       During January-April 2008, Ms. Lial made additional complaints against Mr. Woodward. Ms.  
23 Lial’s January 16, 2008 email to Ms. Rorabaugh complained that Mr. Woodward required a  
24 “Confidential Assistant” to attend his meetings with Ms. Lial but not meetings with her “colleagues”  
25 to single out Ms. Lial. Ms. Rorabaugh’s January 16, 2008 email responded to Ms. Lial that “we plan  
26 to continue the practice of having a confidential assistant in meetings between you and Tod. Based on  
27 your complaint of harassment, we feel it is better to take this proactive step.”

28       In March 2008, Ms. Lial complained to Ms. Rorabaugh about a coworker training Ms. Lial. On

1 March 18, 2008, Ms. Rorabaugh discussed with Ms. Lial work related issues, including those Ms. Lial  
2 had with Mr. Woodward. Ms. Rorabaugh declares that she “investigated Ms. Lial’s concerns and found  
3 them to be unsubstantiated.”

4 On April 15, 2008, Ms. Lial complained to Ms. Rorabaugh about Mr. Woodward’s demeaning  
5 treatment of Ms. Lial by his attitude and demeanor. Ms. Rorabaugh investigated Ms. Lial’s complaints  
6 and “did not find evidence to substantiate her complaints.” Ms. Rorabaugh’s April 17, 2008 memo to  
7 Ms. Lial regarding Ms. Rorabaugh’s findings concluded: “Please be aware that should you continue to  
8 make unfounded allegations, we may take corrective action, which could include disciplinary action.”

9 The County notes Ms. Rorabaugh investigated four of Ms. Lial’s complaints and that an outside  
10 investigator addressed another of her complaints through which none of Ms. Lial’s allegations were  
11 substantiated. Ms. Lial did not appeal the investigations’ findings. Ms. Lial acknowledges that she has  
12 “no idea what steps” Ms. Rorabaugh took for her investigations and “can’t even begin to guess what she  
13 should have done.”

#### 14 **Discipline Of Ms. Lial**

15 Since 2005, Ms. Lial has received multiple counselings, a letter of reprimand and two  
16 suspensions along with counseling and discipline from five supervisors.

17 As Ms. Lial’s supervisor, Mr. Newton expressed what Ms. Lial concedes as legitimate concerns  
18 regarding her performance, for instance, “not closing out a file properly” and “time frames in responding  
19 to individuals.” Mr. Newton’s June 6, 2005 memo to Ms. Lial addressed delays to clean up a property.  
20 Mr. Newton’s April 10, 2006 memo to Ms. Lial criticized her delay to complete tasks and her  
21 disorganization. The memo noted that “placing blame on others when you’ve missed deadlines and/or  
22 failing to take action commensurate with your position is unacceptable and cannot continue.” The memo  
23 further noted “complaints from other staff that you have a ‘disruptive attitude and at times you try to  
24 undermine my authority.’”

25 After Mr. Newton’s termination, Denise Wood (“Ms. Wood”), Environmental Health Unit  
26 Manager, supervised DER. During her three-month supervision of Ms. Lial, Ms. Wood expressed orally  
27 and in writing concerns about Ms. Lial’s performance. Ms. Wood orally noted that Ms. Lial was not  
28 “diligent enough” to contact a property owner regarding a surfacing sewage complaint and that Ms. Lial

1 failed to take sufficient photos of a property.

2 Ms. Wood's October 11, 2007 memo to Ms. Lial addressed "continued concerns" with inaccurate  
3 weed and seed billing, internet usage to interfere with Ms. Lial's "production," and failure to complete  
4 tasks and process cases timely and properly.

5 Mr. Woodward's February 12, 2008 memo to Ms. Lial followed up their January 30, 2008  
6 meeting and criticized Ms. Lial's "delays in working the cases assigned to you," the disproportionate  
7 amount of time Ms. Lial spends in the office compared to the field, and her "time management." The  
8 memo further addressed Ms. Lial's "unacceptable attitude":

9 You are abrupt, harsh and rude during unit meetings, and hostile, argumentative, and  
10 disrespectful when speaking to me. Your resistance is evidenced by your unwillingness  
11 to follow simple instructions and your constant questioning of direction that you have  
12 been given.

13 . . . it is inappropriate to be rude, hostile and continue to be argumentative about the  
14 direction that you have received. This behavior must stop immediately.

15 . . . you must work on improving in the areas you are deficient, which include the  
16 inability to accept criticism, your defensiveness when asked questions regarding your  
17 cases, your impatience with authority, improving time management and improving  
18 follow through when working your cases.

19 The memo noted that Mr. Woodward scheduled "a follow-up review of cases, in approximately four  
20 weeks."

21 On March 18, 2008, Mr. Woodward met with Ms. Lial, using the words of his declaration, "to  
22 reassess her time management and efficiency, and to follow-up our January 30, 2008 meeting. I had  
23 discovered that Ms. Lial had not worked on multiple files and delayed working on others. I did not see  
24 improvement in her time management and efficiency." Mr. Woodward's March 18, 2008 memo to Ms.  
25 Lial addressed "major concerns" of "case management" and "organization" and re-emphasized concerns  
26 with "file preparation, research, time management, and attitude expectations." Mr. Woodward directed  
27 Ms. Lial to "mandatory" training with coworker Robert Miramontes ("Mr. Miramontes"), using the  
28 memo's words, "to help you define your cases, establish a daily routine and provide time management  
strategies."

Mr. Woodward issued to Ms. Lial a March 20, 2008 letter of reprimand for "inefficiency;  
inexcusable neglect of duties; dishonesty" regarding February 14 and 27, 2008 incidents. The letter

1 concluded:

2 Your failure to adhere to procedures and expectations set forth regarding code  
3 enforcement complaints, calls into question my confidence in you in your current  
4 position. Immediate and marked improvement must be made or more severe disciplinary  
5 action including suspension, demotion or discharge may be taken.

6 The County issued Ms. Lial a July 16, 2008 order for a 40-hour suspension for, among other  
7 things, her “incomplete work on cases” and “delays in working files.” The order noted that Ms. Lial’s  
8 “actions, or lack of actions, has placed additional work on other employees” and failure to follow  
9 procedures and complete work to constitute “inefficiency, and inexcusable neglect of duty.” The order  
10 notified Ms. Lial of her right to appeal. Ms. Lial waived an appeal of her suspension in exchange for  
11 a reduced suspension to 40 hours from 15 days. Ms. Lial acknowledges that “[t]here might be some  
12 truth to the allegations” of the July 16, 2008 order but claims she was “treated differently” than  
13 colleagues.

14 The County issued Ms. Lial a November 5, 2008 order for a 30-day suspension for  
15 “incompetence; inefficiency; inexcusable neglect of duties; insubordination; dishonesty; willful  
16 disobedience; and violation of Department rules” for incidents of “failure to properly research the  
17 property zoning,” “giving of inaccurate information to the property owners,” issuing citations with  
18 wrong code violations, entering property without consent or a warrant to constitute Fourth Amendment  
19 violations, and failure “to follow written orders.”

20 On April 8 and 9, 2010, the County’s Employee Disciplinary Proceedings Hearing Board  
21 (“hearing board”) conducted an evidentiary hearing on Ms. Lial’s 30-day suspension. During the  
22 hearing, Ms. Lial argued that her suspension was discriminatory and in retaliation for ending her  
23 romantic relationship with Mr. Woodward. The three-person hearing board unanimously upheld the  
24 suspension. Ms. Lial did not further challenge the suspension.

25 In September 2009, DER Assistant Director Rowe Barney (“Mr. Barney”) investigated a case  
26 Ms. Lial handled involving animals on a property. Mr. Barney’s October 6, 2009 memo to Ms. Lial  
27 notes Ms. Lial’s failure to:

- 28 1. “[P]roperly research the parcel size prior to your inspection of the parcel and prior to  
talking with the property owner regarding the small livestock farming operation”;



1 The County notes that the letter failed to specify a requested accommodation, Ms. Lial's medical  
2 condition, or claimed limitations. Ms. Lial admits in her response to the County's request for admission  
3 that she did not notify the County of her alleged disability until her January 23, 2009 letter to request an  
4 accommodation.

5 Ms. Rorabaugh's February 5, 2009 letter responded that the County could not engage in the  
6 interactive process in absence of "medical documentation" to evaluate Ms. Lial's request and, to that  
7 end, requested "medical documentation in regards to specific accommodations . . . to perform the  
8 essential functions of your job." The letter enclosed the zoning enforcement officer job description and  
9 task analysis for Ms. Lial's physician to provide "medical documentation of necessary  
10 accommodations."

11 Dr. Cheang released Ms. Lial to return to work on March 11, 2009 "with reasonable  
12 accommodation not to work under direct supervision of her manager." The note identified neither a  
13 disability, Ms. Lial's restrictions, nor essential functions which she could not perform. Ms. Rorabaugh's  
14 March 16, 2009 letter to Ms. Lial denied an accommodation to work under a different supervisor and  
15 requested "a new note with clarification of your prognosis. The note must specify what date you will  
16 be released to return to work, with what accommodations, and when or if the restrictions will be lifted."

17 Ms. Rorabaugh's March 20, 2009 email to Ms. Lial permitted Ms. Lial to return to work under  
18 Mr. Woodward's supervision and reiterated the need for "a doctor's note as soon as possible, that gives  
19 us any restrictions and your prognosis . . . meaning how long the restrictions are for and an estimated  
20 time when/if you will be back to full duty." Ms. Lial responded with a March 26, 2009 email that she  
21 was "switching doctors," had an April 3, 2009 appointment, and requested "to begin the interactive  
22 process in regards to reasonable accommodation and/or a transfer out of this department prior to seeing  
23 another doctor." Ms. Rorabaugh's March 30, 2009 email responded that "we are unable to engage in  
24 the interactive process" in absence of a doctor's note to "specify what modification of work is necessary,  
25 for what time period, and your prognosis or when your are expected to be released to return to work full  
26 duty with no restrictions."

27 On April 20, 2009, Ms. Lial provided Ms. Rorabaugh the April 15, 2009 note of Vin E.  
28 Neumeyer, M.D. ("Dr. Neumeyer"), that Ms. Lial "is suitable to return to work without accommodation

1 or restrictions. Prognosis: fair.”

2 **Ms. Lial’s Allegations As To Mr. Woodward**<sup>2</sup>

3 ***Harassment***

4 Prior to becoming Ms. Lial’s supervisor, Mr. Woodward was her coworker during September  
5 2006 to late October 2007. Ms. Lial testified that during that time period, Mr. Woodward harassed her  
6 by attempting to humiliate her in unit meetings, attempting to get her in trouble with her supervisor  
7 “regarding cases that we . . . both had contact together on,” and spreading rumors that she had made  
8 degrading comments about other employees. Ms. Lial testified that Mr. Woodward “was trying to get  
9 everybody on his side and against me” but her evidence of spreading rumors was limited to hearsay from  
10 others. Ms. Lial further testified that harassment prior to Mr. Woodward becoming her supervisor  
11 “wasn’t that big of an issue” in that “we didn’t have to have a whole lot of interaction.” Ms. Lial did  
12 not complain about Mr. Woodward’s conduct during October 2006 to late October 2007 because “there  
13 was no need to bring it up” unless “it gets to a point where it’s kind of really causing me some  
14 problems.”

15 After Mr. Woodward became Code Enforcement Manager and Ms. Lial’s supervisor in late  
16 October 2007, Mr. Lial claims he harassed her by:

- 17 1. Criticizing constantly her performance;
- 18 2. Reprimanding her several times;
- 19 3. Suspending her twice without pay;
- 20 4. Demeaning her in March 2008 by requiring her to be trained by coworker Mr.  
21 Miramontes who has less seniority;
- 22 5. Replacing her County car with a truck;<sup>3</sup>
- 23 6. Instructing her to organize her desk;
- 24 7. Denying her request to attend training;
- 25 8. Denying two vacation requests over 2½ years; and

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27 <sup>2</sup> Ms. Lial no longer pursues quid pro quo sexual harassment.

28 <sup>3</sup> Ms. Lial acknowledges that all other Zoning Enforcement Officers drove trucks.



1 **Ms. Lial's Administrative Charge**

2 On December 24, 2008, Ms. Dial filed with the California Department of Fair Employment and  
3 Housing ("DFEH") a complaint ("DFEH charge") against the County and Mr. Woodward to claim, as  
4 recent as October 9, 2008, harassment, retaliation, impermissible non-job related inquiry, failure to  
5 prevent discrimination or retaliation, denial of accommodation/transfer, and failure to engage in  
6 interactive process because of Ms. Lial's sex, marital status, disability, and retaliation for engaging in  
7 protected activity or requesting a protected leave or accommodation. The DFEH charge alleges:

8 My employer and my supervisor are discriminating, harassing and retaliating against me  
9 for my prior complaints of discrimination, harassment and retaliation. The constant  
10 harassment has created a hostile work environment and I have not received support from  
11 human resources or my employer. My employer and supervisor have now disguised their  
12 discrimination, harassment, and retaliation in the form of criticizing my work  
13 performance in effort to terminate me for my complaints.

14 DFEH issued Ms. Lial a December 24, 2008 notice to permit her to proceed with a civil court  
15 action.

16 **Ms. Lial's Operative Complaint**

17 On June 12, 2009, Ms. Lial filed her complaint ("complaint") in this action to allege that:

- 18 1. The County retaliated against Ms. Lial after she complained to Ms. Rorabaugh that Mr.  
19 Newton harassed and discriminated against Ms. Lial based on her sex;
- 20 2. After Ms. Lial ended her romantic relationship with Mr. Woodward in October 2006, Mr.  
21 Woodward retaliated against Ms. Lial "by ignoring her and belittling her in front of  
22 others";
- 23 3. After Mr. Woodward was promoted to Code Enforcement Manager, he "took his  
24 retaliation to another level" and "began to constantly criticize Ms. Lial's performance,  
25 issuing her several letters of reprimand and two suspensions without pay" and further  
26 "demeaned Ms. Lial in March 2008 before her coworkers by requiring her to be trained  
27 by a coworker with less seniority"; and
- 28 4. The County denied Ms. Lial's January 2009 accommodation request and "failed to offer  
an alternative accommodation or engage her in the interactive process."

The complaint alleges claims, which will be discussed in greater detail below, for hostile work

1 environment, sexual harassment, sexual and disability discrimination, retaliation, and failure to prevent  
2 discrimination and harassment to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e,  
3 and the California Fair Employment and Housing Act (“FEHA”), Cal. Gov. Code, §§ 12900, et seq. The  
4 complaint seeks recovery for Ms. Lial’s lost wages and benefits, medical expenses, emotional distress,  
5 and “physical symptoms as a result of this prolonged harassment, retaliation and adverse employment  
6 actions,” and punitive damages.

## 7 DISCUSSION

### 8 Summary Judgment Standards

9 Defendants seeks summary judgment in the absence of evidence to “establish” Ms. Lial’s claims.

10 F.R.Civ.P. 56(b) permits a “party against whom relief is sought” to seek “summary judgment on  
11 all or part of the claim.” “A district court may dispose of a particular claim or defense by summary  
12 judgment when one of the parties is entitled to judgment as a matter of law on that claim or defense.”  
13 *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1<sup>st</sup> Cir. 1999).

14 Summary judgment is appropriate when there exists no genuine issue as to any material fact and  
15 the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c)(2); *Matsushita Elec. Indus.*  
16 *v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *T.W. Elec. Serv., Inc. v. Pacific*  
17 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987). The purpose of summary judgment is to  
18 “pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial.”  
19 *Matsushita Elec.*, 475 U.S. at 586, n. 11, 106 S.Ct. 1348; *International Union of Bricklayers v. Martin*  
20 *Jaska, Inc.*, 752 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1985).

21 On summary judgment, a court must decide whether there is a “genuine issue as to any material  
22 fact,” not weigh the evidence or determine the truth of contested matters. F.R.Civ.P. 56(c)(2); *Covey*  
23 *v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9<sup>th</sup> Cir. 1997); see *Adickes v. S.H. Kress & Co.*,  
24 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467, 82  
25 S.Ct. 486 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9<sup>th</sup> Cir.  
26 1984). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate  
27 inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for  
28 summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106

1 S.Ct. 2505 (1986)

2 The evidence of the party opposing summary judgment is to be believed and all reasonable  
3 inferences that may be drawn from the facts before the court must be drawn in favor of the opposing  
4 party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. The  
5 inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or  
6 whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251-  
7 252, 106 S.Ct. 2505.

8 To carry its burden of production on summary judgment, a moving party “must either produce  
9 evidence negating an essential element of the nonmoving party’s claim or defense or show that the  
10 nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of  
11 persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9<sup>th</sup>  
12 Cir. 2000); *see Soremekun v. Thirfty Payless, Inc.*, 509 F.3d 978, 984 (2007) (moving party is able to  
13 prevail “by pointing out that there is an absence of evidence to support the nonmoving party’s case”);  
14 *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9<sup>th</sup> Cir. 1990). A  
15 “complete failure of proof concerning an essential element of the nonmoving party's case necessarily  
16 renders all other facts immaterial” to entitle the moving party to summary judgment. *Celotex Corp. v.*  
17 *Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

18 “[T]o carry its ultimate burden of persuasion on the motion, the moving party must persuade the  
19 court that there is no genuine issue of material fact.” *Nissan Fire*, 210 F.3d at 1102; *see High Tech*  
20 *Gays*, 895 F.2d at 574. “As to materiality, the substantive law will identify which facts are material.  
21 Only disputes over facts that might affect the outcome of the suit under the governing law will properly  
22 preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

23 “If a moving party fails to carry its initial burden of production, the nonmoving party has no  
24 obligation to produce anything, even if the nonmoving party would have the ultimate burden of  
25 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; *see Adickes*, 398 U.S. at 160, 90 S.Ct. 1598.  
26 “If, however, a moving party carries its burden of production, the nonmoving party must produce  
27 evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103; *see High Tech Gays*, 895 F.2d  
28 at 574. “If the nonmoving party fails to produce enough evidence to create a genuine issue of material

1 fact, the moving party wins the motion for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see*  
2 *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548 (“Rule 56(c) mandates the entry of summary judgment,  
3 after adequate time for discovery and upon motion, against a party who fails to make the showing  
4 sufficient to establish the existence of an element essential to that party’s case, and on which that party  
5 will bear the burden of proof at trial. In such a situation, there can be no ‘genuine issue as to any  
6 material fact,’ since a complete failure of proof concerning an essential element of the nonmoving  
7 party’s case necessarily renders all other facts immaterial.”)

8 F.R.Civ.P. 56(e)(2) requires a party opposing summary judgment to “set out specific facts  
9 showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should,  
10 if appropriate, be entered against that party.” “In the absence of specific facts, as opposed to allegations,  
11 showing the existence of a genuine issue for trial, a properly supported summary judgment motion will  
12 be granted.” *Nilsson, Robbins, et al. v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9<sup>th</sup> Cir. 1988). When  
13 a summary judgment motion is unopposed, a court must “determine whether summary judgment is  
14 appropriate – that is, whether the moving party has shown itself to be entitled to judgment as a matter  
15 of law.” *Anchorage Associates v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3<sup>rd</sup> Cir. 1990). A court  
16 “cannot base the entry of summary judgment on the mere fact that the motion is unopposed, but, rather  
17 must consider the merits of the motion.” *United States v. One Piece of Real Property, etc.*, 363 F.3d  
18 1099, 1101 (11<sup>th</sup> Cir. 2004). A court “need not sua sponte review all of the evidentiary materials on file  
19 at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary  
20 materials.” *One Piece of Real Property*, 363 F.3d at 1101.

21 As discussed below, defendants are entitled to summary judgment in the absence of necessary  
22 evidence to support Ms. Lial’s claims.

### 23 **Hostile Environment/Sexual Harassment**

24 The complaint’s first claim alleges that defendants’ conduct “constitutes hostile work  
25 environment sexual harassment, in violation of Title VII” and that Mr. Woodward “engaged in a  
26 persistent pattern of severe and pervasive harassment, which created a hostile environment for Plaintiff  
27 in the workplace.” The Title VII sexual harassment claim further alleges that the County “failed to  
28 investigate Plaintiff’s complaint and/or failed to take adequate remedial action” and that “[h]arassment

1 continued to occur following Plaintiff’s complaint and Defendant’s response.”

2 The complaint’s second claim alleges that defendants’ sexual harassment “created an abusive  
3 working environment in violation of Government Code Section 12940(j).”<sup>4</sup>

4 ***Limited Title VII Liability***

5 Mr. Woodward contends Title VII liability is limited to the County as an employer.

6 “The liability scheme[] under Title VII . . . limit[s] civil liability to the employer.” *Miller v.*  
7 *Maxwell’s Intern. Inc.*, 991 F.2d 583, 587 (9<sup>th</sup> Cir. 1993). “Congress assessed civil liability only against  
8 an employer under Title VII” and the “statutory scheme itself indicates that Congress did not intend to  
9 impose individual liability on employees.” *Miller*, 991 F.2d at 587. As such, Mr. Woodward is not  
10 subject to the Title VII hostile work environment/sexual harassment claim.

11 ***Hostile Work Environment – Prima Facie Case***

12 Defendants challenge Ms. Lial’s ability to establish a prima facie case of a hostile work  
13 environment/sexual harassment under Title VII and FEHA.

14 “To prevail on a hostile workplace claim premised on either race or sex, a plaintiff must show:  
15 (1) that he was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct  
16 was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of  
17 the plaintiff’s employment and create an abusive work environment.” *Gregory v. Widnall*, 153 F.3d  
18 1071, 1074 (9<sup>th</sup> Cir. 1998) (analyzing Title VII claim).<sup>5</sup>

19 Not all workplace conduct which may be described as harassment affects a term, condition, or  
20 privilege of employment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399 (1986)  
21 (addressing sexual harassment claims under Title VII); *Aguilar v. Avis Rent A Car System, Inc.*, 21  
22 Cal.4th 121, 129-130, 87 Cal.Rptr.2d 132, 138 (1999), *cert. denied*, 529 U.S. 1138, 120 S.Ct. 2029

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23 <sup>4</sup> California Government Code section 12940(j)(1) renders unlawful “[f]or an employer . . . or any other  
24 person because of . . . sex . . . to harass an employee . . . Harassment of an employee . . . by an employee other than an agent  
25 or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails  
26 to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from  
occurring.”

27 <sup>5</sup> Federal and California courts rely on federal interpretations of Title VII to interpret analogous FEHA  
28 provisions which prohibit unlawful discrimination. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9<sup>th</sup> Cir. 1996);  
*Clark v. Claremont Univ. Ctr. & Graduate Sch.*, 6 Cal.App.4th 639, 662, 8 Cal.Rptr.2d 151 (1992).

1 (2000). For harassment to be actionable, it must be sufficiently severe and pervasive “to alter the  
2 conditions of [the victim’s] employment and create an abusive working environment.” *Meritor Savings*,  
3 477 U.S. at 67, 106 S.Ct. 2399 (citation omitted); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d  
4 590, 608, 262 Cal.Rptr. 842 (1989). “[H]arassment consists of conduct outside the scope of necessary  
5 job performance, conduct presumably engaged in for personal gratification, because of meanness or  
6 bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management  
7 of the employer’s business or performance of the supervisory employee’s job.” *Reno v. Baird*, 18 Cal.4th  
8 640, 646-647, 76 Cal.Rptr.2d 499 (1998).

9 “The plaintiff must prove that the defendant’s conduct would have interfered with a reasonable  
10 employee’s work performance and would have seriously affected the psychological well-being of a  
11 reasonable employee and that she was actually offended.” *Fisher*, 214 Cal.App.3d at 609-610, 262  
12 Cal.Rptr. 842. If the victim does not subjectively perceive the environment to be abusive, the conduct  
13 has not actually altered the conditions of the victim’s employment, and there is no actionable  
14 harassment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370-371 (1993).

15 “Harassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show  
16 a concerted pattern of harassment of a repeated, routine or a generalized nature.” *Fisher*, 214  
17 Cal.App.3d at 610, 262 Cal.Rptr. 842. A plaintiff must prove more than a few isolated incidents of  
18 racial enmity. *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1394 (8<sup>th</sup> Cir. 1983), *cert. denied*, 466 U.S.  
19 972, 104 S.Ct. 2347 (1984); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2<sup>nd</sup> Cir. 1986). “When the  
20 workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe  
21 or pervasive to alter the conditions of the victim’s employment and create an abusive working  
22 environment, the law is violated.” *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal.App.4th 397, 409, 27  
23 Cal.Rptr.2d 457 (1994) (internal quotations and citations omitted).

24 The Ninth Circuit uses “a totality of the circumstances test to determine whether a plaintiff’s  
25 allegations make out a colorable claim of hostile work environment.” *Brooks v. City of San Mateo*, 229  
26 F.3d 917, 923 (9<sup>th</sup> Cir. 2000). Factors considered include frequency, severity and level of interference  
27 with work performance and whether discriminatory conduct is physically threatening or humiliating or  
28 a mere offensive utterance. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788, 118 S.Ct. 2275

1 (1998); *Brooks*, 229 F.3d at 924 (citing *Harris*, 510 U.S. at 23, 114 S.Ct. 367); *Lappin v. Laidlaw*  
2 *Transit, Inc.*, 179 F.Supp.2d 1111 (N.D. Cal. 2001).

3 The Ninth Circuit applies a “reasonableness” approach to employer remedies to stop harassment:

4 We too believe that remedies should be “reasonably calculated to end the harassment.”  
5 *Katz*, 709 F.2d at 256. An employer's remedy should persuade individual harassers to  
6 discontinue unlawful conduct. We do not think that all harassment warrants dismissal,  
7 *Barrett*, 726 F.2d at 427; rather, remedies should be “assessed proportionately to the  
8 seriousness of the offense.” *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309  
9 (5th Cir.1987). Employers should impose sufficient penalties to assure a workplace free  
10 from sexual [or racial] harassment. In essence, then, we think that the reasonableness of  
11 an employer's remedy will depend on its ability to stop harassment by the person who  
12 engaged in harassment. In evaluating the adequacy of the remedy, the court may also  
13 take into account the remedy's ability to persuade potential harassers to refrain from  
14 unlawful conduct.

15 *Ellison*, 924 F.2d 872, 882 (9<sup>th</sup> Cir. 1991).

16 Defendants note that Mr. Woodward’s alleged pre-supervisory misconduct comprised attempting  
17 to humiliate her in unit meetings, attempting to get her in trouble with her supervisor regarding cases  
18 that they had each worked on, and spreading rumors that she had made degrading comments about other  
19 employees. Defendants further note that Mr. Woodward’s alleged supervisory misconduct comprised:

- 20 1. Criticizing constantly her performance;
- 21 2. Reprimanding her several times;
- 22 3. Suspending her twice without pay;
- 23 4. Demeaning her in March 2008 by requiring her to be trained by coworker Mr.  
24 Miramontes who has less seniority;
- 25 5. Replacing her County car with a truck;
- 26 6. Instructing her to organize her desk;
- 27 7. Denying her request to attend training;
- 28 8. Denying two vacation requests over 2½ years; and
9. Forcing her to take six minutes of vacation time when she was late.

### ***Conduct Based On Sex***

29 Defendants challenge that Mr. Woodward’s alleged misconduct was based on sex in that Ms. Lial  
30 acknowledges that Mr. Woodward’s alleged harassment arose from personal animosity for their failed  
31 romantic relationship. Defendants attribute Ms. Lial to claim “jilted love turned harassment.”

1 In *Succar v. Dade County School Bd.*, 60 F.Supp.2d 1309, 1314-1315 (S.D. Fla. 1999), a fellow  
2 district court explained:

3 Here, we have the classic setting of a love affair gone awry, with [defendant] Ms. Lorenz  
4 (taking the facts in the light most favorable to Plaintiff) playing the part of the proverbial  
5 jilted lover attempting to seek retribution. As such, the Court finds that Ms. Lorenz's  
6 harassment arises not out of the fact that Plaintiff is male, but rather, out of the  
7 termination of the intimate physical and emotional relationship she shared with him.  
8 Clearly, the end of this ill-fated relationship brought with it hurt feelings and bruised  
9 egos – perfect ingredients for the bearing of a grudge. Viewing the undisputed material  
10 facts in the light most favorable to Plaintiff, it is clear to the Court that the consequence  
11 of the failed relationship (i.e., Ms. Lorenz's harassment of Plaintiff) was not the result of  
12 Plaintiff's gender “but of responses to an individual because of her former intimate place  
13 in [that individual's] life.” *Kepler v. Hinsdale Township High Sch. Dist.* 86, 715 F.Supp.  
14 862, 869 (N.D.Ill.1989). In other words, Plaintiff's gender was not the impetus for Ms.  
15 Lorenz's conduct; rather, it was merely coincidental to that conduct. *See Huebschen v.*  
16 *Department of Health and Soc. Servs.*, 716 F.2d 1167, 1172 (7th Cir.1983).

17 Moreover, “[p]ersonal animosity is not the equivalent of sex discrimination” and a “plaintiff  
18 cannot turn a personal feud into a sex discrimination case by accusation.” *McCullum v. Bolger*, 794 F.2d  
19 602, 610 (11th Cir.1986) *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883 (1987).

20 Defendants seek to defeat the Title VII and FEHA hostile environment/sexual harassment claims  
21 in that “Mr. Woodward’s alleged conduct was based on personal animosity, which is not the equivalent  
22 of harassment based on sex.” Indeed, in her deposition, Ms. Lial attributed Mr. Woodward’s harassment  
23 to her ending their romantic relationship. As such, Ms. Lial concedes that her gender was not the  
24 impetus for Mr. Woodward’s conduct. As a reminder, to prevail, “an employee claiming harassment  
25 based upon a hostile work environment must demonstrate that the conduct complained of was severe  
26 enough or sufficiently pervasive to alter the conditions of employment and create a work environment  
27 that qualifies as hostile or abusive to employees **because of their sex.**” *Miller v. Department of*  
28 *Corrections*, 36 Cal.4th 446, 462, 115 P.3d 77 (2005). The record lacks evidence that purported  
harassment of Ms. Lial was based on her sex.

### *Different Treatment*

29 Defendants further challenge Ms. Lial’s hostile environment/sexual harassment claims in the  
30 absence of evidence that “females were treated differently than males.”

31 The critical issue for sexual harassment “is whether members of one sex are exposed to  
32 disadvantageous terms or conditions of employment to which members of the other sex are not

1 exposed.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998 (1998) (quoting  
2 *Harris*, 510 U.S. at 25, 114 S.Ct. at 372 (Ginsburg J., concurring)). The U.S. Supreme Court has noted  
3 that sexual harassment may arise in the absence of “ explicit or implicit proposals of sexual activity”:

4 But harassing conduct need not be motivated by sexual desire to support an inference of  
5 discrimination on the basis of sex. A trier of fact might reasonably find such  
6 discrimination, for example, if a female victim is harassed in such sex-specific and  
derogatory terms by another woman as to make it clear that the harasser is motivated by  
general hostility to the presence of women in the workplace.

7 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81, 118 S.Ct. 998.

8 Defendants point out that Ms. Lial acknowledges that since her romantic relationship with Mr.  
9 Woodward ended, Mr. Woodward neither has made unwarranted sexual advances nor engaged in  
10 unwarranted sexual conduct. As such, defendants hold Ms. Lial “to prove her sexual harassment claims  
11 with comparative evidence of how Mr. Woodward treated others.” Defendants note the absence of such  
12 evidence to further doom her hostile environment/sexual harassment claims.

#### 13 ***Mr. Woodward’s Pre-Supervisory Conduct***

14 Defendants point to an absence of evidence of Mr. Woodward’s alleged harassment during  
15 September 2006-November 2007, prior to his becoming Ms. Lial’s supervisor. Defendants argue that  
16 Ms. Lial is unable to show that “Mr. Woodward’s alleged conduct was severe or pervasive to alter the  
17 conditions of Plaintiff’s employment and create a hostile working environment.” Defendants point to  
18 Ms. Lial’s testimony that Mr. Woodward’s pre-supervisory conduct “wasn’t that big of an issue” in that  
19 “we didn’t have to have a whole lot of interaction.” Ms. Lial did not complain about Mr. Woodward’s  
20 conduct during October 2006 to November 2007 because “there was no need to bring it up” unless “it  
21 gets to a point where it’s kind of really causing me some problems.”

#### 22 ***Mr. Woodward’s Supervisory Conduct***

23 Defendants contend that Mr. Woodward’s conduct as Ms. Lial’s supervisor was not harassment  
24 in that it reflects his “managerial actions” to supervise Ms. Lial’s performance, establish policies and  
25 procedures, and align DER practices. Defendants note the distinction between sexual harassment and  
26 gender discrimination.

27 Courts apply “the concept of delegable authority as a test to distinguish conduct actionable as  
28 discrimination from conduct actionable as harassment” in that “exercise of personnel management

1 authority properly delegated by an employer to a supervisory employee might result in discrimination,  
2 but not in harassment.” *Reno*, 18 Cal.4th at 646, 76 Cal.Rptr.2d 499; *See Stephens v. Kay Management*  
3 *Co., Inc.* 907 F.Supp. 169, 171, 173 (E.D.Va. 1995) (no personal liability of individual supervisors for  
4 “employment-related decisions” or “personnel decisions of a plainly delegable character”). The  
5 California Supreme Court has explained:

6 Making a personnel decision is conduct of a type fundamentally different from the type  
7 of conduct that constitutes harassment. Harassment claims are based on a type of conduct  
8 that is avoidable and unnecessary to job performance. . . . Making personnel decisions  
9 is an inherent and unavoidable part of the supervisory function. Without making  
10 personnel decisions, a supervisory employee simply cannot perform his or her job duties.

11 . . . commonly necessary personnel management actions such as hiring and firing,  
12 job or project assignments, office or work station assignments, promotion or demotion,  
13 performance evaluations, the provision of support, the assignment or nonassignment of  
14 supervisory functions, deciding who will and who will not attend meetings, deciding who  
15 will be laid off, and the like, do not come within the meaning of harassment. These are  
16 actions of a type necessary to carry out the duties of business and personnel management.  
17 These actions may retrospectively be found discriminatory if based on improper motives,  
18 but in that event the remedies provided by the FEHA are those for discrimination, not  
19 harassment. Harassment, by contrast, consists of actions outside the scope of job duties  
20 which are not of a type necessary to business and personnel management. This significant  
21 distinction underlies the differential treatment of harassment and discrimination in the  
22 FEHA.”

23 *Reno*, 18 Cal.4th at 646, 76 Cal.Rptr.2d 499 (quoting *Janken v. GM Hughes Electronics*, 46 Cal.App.4th  
24 55, 63-65 (1996).

25 Mr. Woodward’s alleged misconduct since becoming Ms. Lial’s supervisor addresses is exercise  
26 of personnel management authority. The gist of his alleged misconduct is supervision of Ms. Lial’s  
27 work performance. Such conduct does not equate to harassment to warrant summary judgment for  
28 defendants on Ms. Lial’s hostile environment/sexual harassment claims.

### **Sexual Discrimination**

29 The complaint’s third claim alleges that Ms. Lial “was subject to severe and pervasive  
30 discrimination by the County on the basis of her sex” to violate 42 U.S.C. § 2000e-2(a)(1) which renders  
31 as an “unlawful employment practice for an employer” to “discriminate against any individual with  
32 respect to his compensation, terms, conditions, or privileges of employment, because of such individual's  
33 . . . sex . . .”

34 The complaint’s fourth claim alleges that the County “discriminated against Ms. Lial in

1 compensation or in terms, conditions or privileges of employment based upon her sex” to violate  
2 Government Code Section 12940(a) which deems unlawful: “For an employer, because of . . . sex . . .  
3 to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or  
4 to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

5 Ms. Lial claims that Mr. Woodward discriminated against her by:

- 6 1. Criticizing constantly her work performance;
- 7 2. Issuing her “several letters of reprimand”;
- 8 3. Issuing her two suspensions without pay;
- 9 4. Requiring her to be trained by less senior Mr. Miramontes; and
- 10 5. “[L]aunching two investigations against her.

### 11 ***Burden Shifting Framework***

12 Defendants challenge the merits of Ms. Lial’s discrimination and retaliation claims. For Title  
13 VII and FEHA discrimination and retaliation claims at issue here, courts apply the *McDonnell Douglas*<sup>6</sup>  
14 burden-shifting framework. *Metoyer v. Chassman*, 504 F.3d 919, 931 (9<sup>th</sup> Cir. 2007); *Miller v. Fairchild*  
15 *Industries, Inc.*, 797 F.2d 727, 730-731 (9<sup>th</sup> Cir. 1986) (order and allocation of proof for retaliation  
16 claims follow familiar scheme announced in *McDonnell Douglas*). “At the first step of *McDonnell*  
17 *Douglas*, the plaintiff must establish a prima facie case of discrimination or retaliation.” *Metoyer*, 504  
18 F.3d at 931, n. 6. “If the plaintiff makes out her prima facie case of either discrimination or retaliation,  
19 the burden then ‘shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its  
20 allegedly discriminatory [or retaliatory] conduct.’” *Metoyer*, 504 F.3d at 931, n. 6 (quoting *Vasquez v.*  
21 *County of Los Angeles*, 349 F.3d 634, 640 (9<sup>th</sup> Cir. 2003)).

22 “Finally, at the third step of *McDonnell Douglas*, if the employer articulates a legitimate reason  
23 for its action, ‘the presumption of discrimination drops out of the picture, and the plaintiff may defeat  
24 summary judgment by satisfying the usual standard of proof required’” under F.R.Civ.P. 56(e)(2).  
25 *Metoyer*, 504 F.3d at 931 (quoting *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9<sup>th</sup> Cir.  
26 2006) (citations and internal quotation marks omitted)). If the employer carries its burden, plaintiff must

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27  
28 <sup>6</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

1 have an opportunity to prove by a preponderance of evidence that the legitimate reasons offered by the  
2 employer were not its true reasons but were a pretext for discrimination. *Texas Dept. of Community*  
3 *Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981); *McDonnell Douglas*, 411 U.S. at 804; 93  
4 S.Ct. 1817; *see Brundage v. Hahn*, 57 Cal.App. 4<sup>th</sup> 228, 66 Cal.Rptr.2d 830, 835 (1997). “If a plaintiff  
5 succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive,  
6 summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be  
7 believed.” *Washington v. Garrett*, 10 F.3d 1421, 1432-1433 (9<sup>th</sup> Cir. 1993).

8         Despite the burden shifting, the ultimate burden of proof remains always with the plaintiff to  
9 show that the employer intentionally discriminated because of the plaintiff’s sex. *See Burdine*, 450 U.S.  
10 at 253, 101 S.Ct. 1089; *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9<sup>th</sup> Cir. 2000); *Rose v. Wells*  
11 *Fargo & Co.*, 902 F.2d 1417, 1420-1421 (9<sup>th</sup> Cir. 1990), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2592  
12 (2001).

13         As an alternative to the *McDonnell Douglas* framework, a plaintiff responding to a summary  
14 judgment motion “may simply produce direct or circumstantial evidence demonstrating that a  
15 discriminatory [or retaliatory] reason more likely than not motivated [the employer].” *McGinest v. GTE*  
16 *Service Corp.*, 360 F.3d 1103, 1122 (9<sup>th</sup> Cir. 2004) (citation omitted). The “*McDonnell Douglas* test is  
17 inapplicable where the plaintiff presents direct evidence of discrimination.” *Trans World Airlines, Inc.*  
18 *v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613 (1985).

19         “When the plaintiff offers direct evidence of discriminatory [or retaliatory] motive, a triable issue  
20 as to the actual motivation of the employer is created even if the evidence is not substantial. . . . it need  
21 be ‘very little.’” *Goodwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9<sup>th</sup> Cir. 1998) (quoting *Lindahl*  
22 *v. Air France*, 930 F.2d 1434, 1438 (9<sup>th</sup> Cir 1991)). “Direct evidence is evidence which, if believed,  
23 proves the fact [of retaliation] without inference or presumption.” *Goodwin*, 150 F.3d at 1221 (citation  
24 omitted). “Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory  
25 statements or actions by the employer.” *Coghlan v. American Seafoods Co. LLC.*, 413 F.3d 1090, 1095  
26 (9<sup>th</sup> Cir. 2005).

27         With these evidentiary standards in mind, this Court turns to the worthiness of Ms. Lial’s  
28 discrimination and retaliation claims.

1 ***Prima Facie Case Of Discrimination***

2 Ms. Lial pursues a disparate treatment claim that females were treated less favorably because of  
3 their sex. A disparate treatment theory “requires a showing that the employer acted with discriminatory  
4 intent.” *Jones v. Department of Corrections and Rehabilitation*, 152 Cal.App.4th 1367, 1379, 62  
5 Cal.Rptr.3d 200 (2007).

6 To succeed on a disparate treatment claim, a plaintiff has an initial burden to establish a prima  
7 facie case of discrimination, that is, “a set of circumstances that, if unexplained, permit an inference that  
8 it is more likely than not the employer intentionally treated the employee less favorably than others on  
9 prohibited grounds.” *Jones*, 152 Cal.App.4th at 1379, 62 Cal.Rptr.3d 200; *see Bradley v. Harcourt,*  
10 *Brace and Co.*, 104 F.3d 267, 270 (9<sup>th</sup> Cir. 1996) (plaintiff “bears the initial burden of establishing a  
11 prima facie case of discrimination by introducing evidence that gives rise to an inference of unlawful  
12 discrimination”).

13 For a prima facie case, a plaintiff “must generally show” that:

- 14 1. He/she was a member of a protected class;
- 15 2. He/she was qualified for the position sought and performed his/her job satisfactorily;
- 16 3. He/she suffered an adverse employment action; and
- 17 4. Similarly situated individuals outside the protected class were treated more favorably,  
18 or other circumstances surrounding the adverse employment action give rise to an  
19 inference of discrimination.

20 *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151, 1156 (9<sup>th</sup> Cir. 2010); *Jones*, 152 Cal.App.4th  
21 at 1379, 62 Cal.Rptr.3d 200 (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 354-355, 100 Cal.Rptr.2d  
22 352 (2000) (adopting the test applicable to federal discrimination claims in accordance with *McDonnell*  
23 *Douglas*)).

24 “On a defense motion for summary judgment against a disparate treatment claim, the defendant  
25 must show either that one of these elements cannot be established or that there were one or more  
26 legitimate, nondiscriminatory reasons underlying the adverse employment action.” *Jones*, 152  
27 Cal.App.4th at 1379, 62 Cal.Rptr.3d 200.

28 Defendants challenge Ms. Lial’s ability to demonstrate that she performed her job satisfactorily

1 or that similarly situated persons outside the protected class were treated more favorably.

2 ***Unsatisfactory Job Performance***

3 Defendants point to a lack of evidence that Ms. Lial performed her job satisfactorily given that  
4 during four years she received from five supervisors eight memos of discussion, a letter of reprimand  
5 and two suspensions without pay. Defendants note the common thread of Ms. Lial’s discipline of  
6 “failure to follow procedures when working on cases, delay in working on cases, and poor  
7 responsiveness to County employees and residents.”

8 A review of Ms. Lial’s discipline since 2005 reveals recurring problems with her work delays,  
9 missed deadlines, blaming others, disruptive attitude, attempts to undermine authority, lack of diligence,  
10 inaccuracies, inefficiency, hostility, unwillingness to follow instructions, inability to accept criticism,  
11 lack of improvement and organization, dishonesty, insubordination, inexcusable neglect of duty, and  
12 incompetence. The evidence reveals that Ms. Lial cannot establish her satisfactory job performance.

13 ***Disparate Treatment***

14 Defendants challenge Ms. Lial’s evidence that “Mr. Woodward treated men more favorably than  
15 women.” Defendants note that in her deposition, Ms. Lial lacks specifics or reasons of Mr. Woodward’s  
16 favoring men and merely pointed to Mr. Woodward’s “BS’ing” with men. Defendants are correct that  
17 Ms. Lial lacks evidence that Mr. Woodward treated men more favorably than women.

18 ***Legitimate, Non-Discriminatory Reasons***

19 Defendants argue that despite Ms. Lial’s lack of a prima facie case of discrimination, the County  
20 utilized “legitimate reasons for correcting or disciplining” Ms. Lial. Defendants reiterate that “five  
21 different supervisors have issued Plaintiff documentation regarding similar, recurring performance  
22 issues.”

23 If plaintiff establishes a prima facie case, the burden shifts to the employer “to articulate some  
24 legitimate, nondiscriminatory reason” for adverse employment action. *McDonnell Douglas Corp.*, 411  
25 U.S. at 802, 93 S.Ct. 1817; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101  
26 S.Ct. 1089, 1094-1095 (1981); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9<sup>th</sup> Cir. 2000), *cert.*  
27 *denied*, 533 U.S. 950, 121 S.Ct. 2592 (2001); *Guz*, 24 Cal.4th at 355-356, 100 Cal.Rptr. at 379;  
28 *Brundage v. Hahn*, 57 Cal.App.4th 228, 236, 66 Cal.Rptr.2d 830, 835 (1997). “The defendant's burden

1 at this stage is one of production, not persuasion. The court may not make a credibility assessment.”  
2 *Njenga v. San Mateo County Superintendent of Schools*, 2010 WL 1261493, at \*14 (N.D. Cal. 2010)  
3 (citing *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097 (2000)). If  
4 the employer presents admissible evidence that one of more of plaintiff’s prima facie elements is lacking  
5 or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer  
6 is entitled to summary judgment unless the plaintiff produces admissible evidence to raise a triable issue  
7 of fact material as to the employer’s showing. *Caldwell v. Paramount Unified School District*, 41  
8 Cal.App.4th 189, 203, 48 Cal.Rptr.2d 448, 457 (1995).

9 This Court need not repeat Ms. Lial’s extensive disciplinary record which is replete with  
10 documentation of numerous deficiencies, including, for example, uncooperativeness, unresponsiveness,  
11 failure to follow procedures, dishonesty, insubordination, disrespect, inaccuracies, disorganization, and  
12 exposing the County to potential liability. The record offers nothing meaningful to raise a factual issue  
13 as to her disciplinary record which supports legitimate, non-discriminatory reasons for her treatment.

#### 14 *Pretext*

15 Defendants challenge Ms. Lial’s ability to demonstrate that the County’s grounds for Ms. Lial’s  
16 treatment is a pretext for discrimination.

17 “If the defendant offers admissible evidence of a legitimate, nondiscriminatory reason for the  
18 claimed adverse action, the *McDonnell Douglas* framework and its presumption of discrimination  
19 disappears, and the plaintiff is left to prove by a preponderance of the evidence that the reasons offered  
20 by the defendant are merely a pretext for discrimination.” *Njenga*, 2010 WL 1261493, at \*14 (citing *see*  
21 *Reeves*, 530 U.S. 133, 143, 120 S.Ct. 2097 (2000)). If the employer carries its burden, plaintiff must  
22 have an opportunity to prove by a preponderance of evidence that the legitimate reasons offered by the  
23 employer were not its true reasons but were a pretext for discrimination. *McDonnell Douglas*, 411 U.S.  
24 at 804; 93 S.Ct. 1817; *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089; *see Manatt v. Bank of America, N.A.*,  
25 339 F.3d 792, 801 (9<sup>th</sup> Cir. 2003) (“Because [plaintiff] failed to introduce any direct or specific and  
26 substantial circumstantial evidence of pretext, summary judgment for the [defendant] must be  
27 affirmed.”); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9<sup>th</sup> Cir. 1983) (failure to “produce any specific,  
28 substantial evidence of pretext” support summary judgment for employer); *Brundage*, 57 Cal.App.4th

1 at 236, 66 Cal.Rptr.2d at 835.

2 Ms. Lial’s claim of pretext appears to be grounded in Mr. Woodward’s dissatisfaction with Mr.  
3 Lial ending their romantic relationship. Ms. Lial’s perception of Mr. Woodward’s feelings or motives  
4 fails to challenge meaningfully the numerous legitimate reasons to support her discipline. The record  
5 lacks specific, substantial evidence of pretext to discriminate against Ms. Lial based on her sex.

6 In short, defendants are entitled to summary judgment on Ms. Lial’s discrimination claims.

7 **FEHA Retaliation**

8 The complaint’s fifth claim alleges that defendants “retaliated against Ms. Lial by adversely  
9 affecting Ms. Lial’s employment after she complained about and/or opposed harassment and  
10 discrimination” which Ms. Lial claims to violate FEHA. California Government Code section 12940(h)  
11 renders unlawful for an employer “to discharge, expel, or otherwise discriminate against any person  
12 because the person has opposed any practices forbidden under this part or because the person has filed  
13 a complaint, testified, or assisted in any proceeding under this part.” California Government Code  
14 section 12940(h) “incorporates other unlawful employment practices defined in other parts of section  
15 12940, and forbids retaliation against anyone opposing any such unlawful employment practice.” *Jones*  
16 *v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 1164, 72 Cal.Rptr.3d 624 (2008).

17 ***Prima Facie Case Of Retaliation***

18 Ms. Lial supports alleged retaliation with Mr. Woodward’s same conduct to support her  
19 harassment claims. Defendants challenge Ms. Lial’s ability to establish a prima facie case of FEHA  
20 retaliation.

21 Courts use the same burden shifting frame work for discrimination claims to analyze FEHA  
22 retaliation claims. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1042, 116 P.3d 1123 (2005). To  
23 make out a retaliation prima facie case, a plaintiff must demonstrate that:

- 24 1. He/she engaged in protected activity;  
25 2. He/she suffered an adverse employment action; and  
26 3. There was a causal link between his/her activity and the employment action.

27 *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1065-1066 (9<sup>th</sup> Cir. 2003); *Yanowitz*, 36 Cal.4th at  
28 1042, 116 P.3d 1123; *Fisher*, 214 Cal.App.3d at 615, 262 Cal.Rptr. 842.

1 Defendants contend that Ms. Lial is unable to establish that she engaged in a protected activity  
2 in that Ms. Lial attributes Mr. Woodward’s retaliation to Ms. Lial’s ending their romantic relationship.  
3 Defendants are correct that “[e]nding a romantic relationship is not an activity protected by FEHA.”

4 Defendants further challenge existence of a causal link between a protected activity and an  
5 adverse employment action.

6 “To establish causation, the plaintiff must show by a preponderance of the evidence that  
7 engaging in the protected activity was one of the reasons for the adverse employment decision and that  
8 but for such activity the decision would not have been made.” *Kraus v. Presidio Trust Facilities*  
9 *Division/Residential Management Branch*, \_\_ F.Supp.2d \_\_, 2010 WL 1293788 (N.D. Cal. 2010) (citing  
10 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir.2002)). “The causal link may be  
11 established by an inference derived from circumstantial evidence, ‘such as the employer’s knowledge  
12 that the [plaintiff] engaged in protected activities and the proximity in time between the protected action  
13 and allegedly retaliatory employment decision.’” *Jordan v. Clark*, 847 F.2d 1368, 1376 (9<sup>th</sup> Cir. 1988)  
14 (quoting *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9<sup>th</sup> Cir. 1987)).

15 Again, defendants rely on Ms. Lial’s acknowledgment that Mr. Woodward’s alleged retaliation  
16 arose from Ms. Lial’s ending their romantic relationship to negate adverse employment action arising  
17 from Ms. Lial’s protected activity. Defendants are correct that Ms. Lial is unable to establish the  
18 causation link in the absence of a recognized protected activity.

19 ***Legitimate, Non-Discriminatory Reasons***

20 Defendants reiterate that their legitimate, non-discriminatory reasons to defeat Ms. Lial’s  
21 discrimination claims likewise defeat her FEHA retaliation claim. Defendants are correct.

22 ***Pretext***

23 Defendants argue that Ms. Lial lacks evidence that “the County’s articulated reasons for its  
24 actions are a pretext for retaliation.” “If the employer produces a legitimate reason for the adverse  
25 employment action, the presumption of retaliation ‘drops out of the picture,’ and the burden shifts back  
26 to the employee to prove intentional retaliation.” *Akers v. County of San Diego*, 95 Cal.App.4th 1441,  
27 1453, 116 Cal.Rptr.2d 602 (2002). Ms. Lial lacks evidence of pretext to further doom her FEHA  
28 retaliation claim, on which defendants are entitled to summary judgment.

1 **FEHA Disability Discrimination**

2 The complaint’s sixth claim alleges that the County “discriminated against Ms. Lial based upon  
3 her physical or mental disability” to violate California Government Code section 12940(a), which deems  
4 unlawful: “For an employer, because of . . . physical disability, mental disability, medical condition . .  
5 . to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or  
6 to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

7 ***Prima Facie Case Of FEHA Disability Discrimination***

8 Defendants challenge Ms. Lial’s evidence to establish a prima facie case of FEHA disability  
9 discrimination.

10 Elements of a prima facie case of disability discrimination are that the plaintiff:

- 11 1. Suffers from a disability;
- 12 2. Is otherwise qualified to perform his/her job with or without reasonable accommodation  
13 in the case of a disability claim; and
- 14 3. Was subjected to adverse employment action because of the disability.

15 *Faust v. California Portland Cement Co.*, 150 Cal.App.4th 864, 886, 58 Cal.Rptr.3d 729 (2007); *Jensen*  
16 *v. Wells Fargo Bank*, 85 Cal.App.4th 245, 255-256, 102 Cal.Rptr.2d 55 (2000); *Brundage v. Hahn*, 57  
17 Cal.App.4th 228, 236, 66 Cal.Rptr.2d 830, 835 (1997); *see McDonnell Douglas Corp. v. Green*, 411  
18 U.S. 792, 802; 93 S.Ct. 1817 (1973); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9<sup>th</sup> Cir. 1994);  
19 *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1343 (9<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 1047,  
20 108 S.Ct. 785 (1988).

21 Defendants contend that Ms. Lial is unable to “prove she suffered an adverse employment action  
22 because of her alleged disability.” Defendants are correct. Ms. Lial claims a stress disability but  
23 acknowledges that she lacks evidence that the County discriminated against her because of stress. Ms.  
24 Lial claims that the County took adverse employment action because of her stress by denying her  
25 accommodation request and interfering with her ability to get a code enforcement management position  
26 with the City of Manteca. Ms. Lial acknowledges her lack of evidence that the County interfered with  
27 her ability to obtain the City of Manteca position or whether the City of Manteca and County  
28 communicated regarding Ms. Lial.

1 Defendants note that failure to accommodate is a separate FEHA claim under California  
2 Government Code section 12940(m), which the complaint does not allege. Defendants further point to  
3 a lack of evidence to support a failure to accommodate claim in that there is no evidence of Ms. Lial's  
4 restrictions requiring accommodation. The record reveals that Dr. Cheang released Ms. Lial to return  
5 to work on March 11, 2009 but identified neither a disability, Ms. Lial's restrictions nor essential job  
6 functions which Ms. Lial could not perform. On April 20, 2009, Dr. Neumeyer released Ms. Lial "to  
7 full duty with no restrictions." Ms. Lial never responded to Ms. Rorabaugh's requests for medical  
8 documentation of Ms. Lial's restrictions and necessary accommodations to satisfy the restrictions.

9 "It is an employee's responsibility to understand his or her own physical or mental condition well  
10 enough to present the employer at the earliest opportunity with a concise list of restrictions which must  
11 be met to accommodate the employee." *Jensen*, 85 Cal.App.4th at 266, 102 Cal.Rptr.2d 55. "An  
12 adverse employment decision cannot be made 'because of' a disability, when the disability is not known  
13 to the employer." *Brundage*, 57 Cal.App.4th at 237, 66 Cal.Rptr.2d 830. To prove a disability  
14 discrimination claim, "a plaintiff must prove the employer had knowledge of the employee's disability  
15 when the adverse employment decision was made." *Brundage*, 57 Cal.App.4th at 237-238, 66  
16 Cal.Rptr.2d 830. "While knowledge of the disability can be inferred from the circumstances, knowledge  
17 will only be imputed to the employer when the fact of disability is the only reasonable interpretation of  
18 the known facts. Vague or conclusory statements revealing an unspecified incapacity are not sufficient  
19 to put an employer on notice of its obligations under the [FEHA]." *Brundage*, 57 Cal.App.4th at 237,  
20 66 Cal.Rptr.2d 830.

21 The record reveals that Ms. Lial neither identified nor articulated a disability needing  
22 accommodation. As such, the County knew of no disability, and Ms. Lial is unable to establish that she  
23 suffered adverse employment due to a disability.

#### 24 ***Exhaustion Of Administrative Remedies***

25 Defendants challenge the scope of Ms. Lial's DFEH charge to include a FEHA disability  
26 discrimination claim.

27 FEHA requires a claimant to file a DFEH charge prior to pursuing a court action. *See* Cal. Gov.  
28 Code, § 12965(b). "Under the FEHA, the employee must exhaust the administrative remedy provided

1 by the statute by filing a complaint with the Department of Fair Employment and Housing . . . and must  
2 obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court  
3 based on violations of the FEHA.” *Romano v. Rockwell Internat., Inc.*, 14 Cal.4th 479, 492, 59  
4 Cal.Rptr.2d 20 (1996). FEHA places a one-year limit from the time of the alleged unlawful practice  
5 to file a DFEH charge. *See* Cal. Gov. Code, § 12960(d) (“No complaint may be filed after the expiration  
6 of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred . .  
7 .”)

8 Defendants argue that Ms. Lial did not file her DFEH charge, dated December 24, 2008, within  
9 one year after alleged disability discrimination in that the alleged disability discrimination arose in  
10 January 2009, after the filing of the DFEH charge. Defendants conclude that Ms. Lial “could not have  
11 validly included disability discrimination in her DFEH complaint a month before the alleged  
12 discrimination occurred.” Defendants point out that the alleged January 2009 disability discrimination  
13 did not relate back to her December 24, 2008 DFEH charge. “[A]mendments introducing a new theory  
14 of recovery generally do not relate back” in that “[e]ven if the factual allegations of the original  
15 [administrative] complaint, rather than the legal theory, establish the proper boundaries of the charge,  
16 the factual allegations must be able to bear the weight of the new theory added by amendment.”  
17 *Rodriguez v. Airborne Express*, 265 F.3d 890, 899 (9<sup>th</sup> Cir. 2001) (plaintiff’s “timely administrative  
18 complaint fails to offer an adequate factual basis to support a charge of disability discrimination, and  
19 thus fails to warrant relation back”).

20 The record reveals that Ms. Lial has failed to exhaust a disability discrimination claim in that the  
21 DFEH charge addresses discrimination, harassment and retaliation for “my prior complaints of  
22 discrimination, harassment and retaliation.” Failure to exhaust administrative remedies further supports  
23 summary judgment for defendants on Ms. Lial’s FEHA disability discrimination charge.

#### 24 **FEHA Failure To Prevent Discrimination And Harassment**

25 The complaint’s seventh claim alleges that the County “did nothing to rectify . . . discrimination  
26 and harassment and failed to take all reasonable steps to prevent harassment” to violate FEHA. The  
27 claim further alleges that the County “allowed a hostile environment to develop against Ms. Lial and  
28 then caused Ms. Lial to suffer adverse employment action.”

1 California Government Code section 12940(k) deems unlawful an employer's failure "to take  
2 all reasonable steps necessary to prevent discrimination and harassment from occurring." Nonetheless,  
3 "[e]mployers should not be held liable to employees for failure to take necessary steps to prevent such  
4 conduct, except where the actions took place and were not prevented." *Trujillo v. North County Transit*  
5 *Dist.*, 63 Cal.App.4th 280, 289, 73 Cal.Rptr.2d 596 (1998).

6 Defendants note an absence of actionable discrimination or harassment to invoke California  
7 Government Code section 12940(k). Defendants point out that investigations of Ms. Rorabaugh and an  
8 outside investigator failed to substantiate five of Ms. Lial's complaints and that Ms. Lial lacks evidence  
9 that their investigations were unfair or inadequate. Ms. Lial acknowledges that she has "no idea what  
10 steps" Ms. Rorabaugh took for her investigation and "can't even begin to guess what she should have  
11 done." Defendants conclude that Ms. Lial's California Government Code section 12940(k) claim "is  
12 based entirely on conjecture."

13 Defendants are correct that Ms. Lial has failed to meet her "burden of presenting evidence  
14 establishing a genuine issue of fact that the employer's response was unreasonable." *See Ford v. West*,  
15 222 F.3d 767, 776 (10<sup>th</sup> Cir. 2000) (analyzing Title VII claim). Ms. Lial lacks a failure to prevent  
16 discrimination and harassment claim in the absence of cognizable discrimination and harassment. The  
17 record reveals that the County properly responded to Ms. Lial's unsubstantiated complaints. Defendants  
18 have negated the claim.

19 **CONCLUSION AND ORDER**

20 For the reasons discussed above, this Court:

- 21 1. GRANTS defendants summary judgment;
- 22 2. DIRECTS the clerk to enter judgment against plaintiff Pamela Lial and in favor of  
23 defendants County of Stanislaus and Tod Woodward and to close this action; and
- 24 3. VACATES the January 4, 2011 pretrial conference and February 14, 2011 trial.

25 IT IS SO ORDERED.

26 **Dated:** November 23, 2010

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE